Arunamari Plantations Sdn Bhd & Ors v Lembaga Minyak Sawit Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S7–21–288 OF 2008
PRASAD ABRAHAM JC
27 APRIL 2010

Constitutional Law — Legislation — Constitutionality — Discriminatory legislation — Whether Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 a discriminatory tax and ultra vires art 8 of the Federal Constitution — Whether discriminatory law good law if based on reasonable classification

Constitutional Law — Legislation — Subsidiary legislation — Delegated authority — Requirement for consultation — Whether Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 invalid for not reflecting consultation with Minister

Revenue Law — Agricultural tax — Levy of cess from oil palm fruit producers — Whether purposive approach applicable in interpretating taxing statute — Whether Malaysian Palm Oil Board Act 1998 authorises imposition of cess upon oil palm fruit produces — Whether Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 a discriminatory tax — Whether cess should be placed in consolidated fund — Whether collection of cess for unauthorised purpose ultra vires, void and illegal — Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007

Statutory Interpretation — Interpretation Act — Purposive approach — Whether apply to taxing statute — Interpretation Acts 1948 and 1967 s 17A — Levy of cess from oil palm fruit producers — Whether Malaysian Palm Oil Board Act 1998 authorises imposition of cess — Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007

Statutory Interpretation — Subordinate legislation — Validity — Whether ultra vires parent Act and Federal Constitution — Test to be applied — Interpretation Acts 1948 and 1967 s 17A — Levy of cess from oil palm fruit producers — Whether Malaysian Palm Oil Board Act 1998 authorises imposition of cess — Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007

Statutory Interpretation — Taxing statute — Levy of cess from oil palm fruit producers — Whether Malaysian Palm Oil Board Act 1998 authorises imposition

of cess — Whether purposive approach applicable — Interpretation Acts 1948 and 1967 s 17A — Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007

Statutory Interpretation — Taxing statute — Strict interpretation — Whether purposive approach to be applied — Interpretation Acts 1948 and 1967 s 17A — Levy of cess from oil palm fruit producers — Whether Malaysian Palm Oil Board Act 1998 authorises imposition of cess — Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007

Trade and Industry — Agriculture — Levy of cess from oil palm fruit producers — Certain categories of people expressly exempt from paying cess — Whether Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 unconstitutional and/or ultra vires — Levy of cess for keeping down price of cooking oil not authorised by s 33 of the Malaysian Palm Oil Board Act 1998 — Whether collection of cess for unauthorised purpose ultra vires, void and illegal

The Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 ('the Cess Order') was made by the second defendant ('the Minister') under the authority of s 35 of the Malaysian Palm Oil Board Act 1998 ('Act') and came into operation on 1 June 2007. The Cess Order provided for the levy and collection of cess by, the first defendant, the Malaysian Palm Oil Board ('the Board'), from oil palm fruit producers on oil palm fruits. By virtue of the Cess Order oil palm fruit producers who owned: (a) oil palm holding which is not less than 40.46 hectares; or (b) oil palm holdings which in aggregate amount to not less than 40.46 hectares, were required to pay the board a cess for every metric ton of oil palm fruit produced at the rates specified in the schedule to the Cess Order when the monthly average price of crude palm oil exceeded RM1,500 per metric ton. Certain categories of people were however expressly exempt from paying cess under the Cess Order. The plaintiff mounted an attack on the Malaysian Palm Oil Board Act 19988 and the Cess Order on the grounds that it violated several provisions of the Federal Constitution ('Constitution') and was therefore unconstitutional and/or ultra vires. The plaintiff claimed, inter alia, that: (i) the Cess Order was ultra vires the Constitution as it did not provide for payment of the cess as a federal tax into the consolidated fund under art 97(1) of the Constitution; (ii) the Cess Order was ultra vires the Constitution as its declared purpose of providing a subsidy for keeping down the price of cooking oil was not authorised by federal law under art 104(3) of the Constitution or at all and was therefore not a lawful purpose for which a tax could be imposed; (iii) the Cess Order was a discriminatory tax and was ultra vires art 8 of the Constitution; (iv) the Cess Order 2007 is invalid, null and void as it did not reflect any consultation with the Minister of Finance; and (v)

whether s 35 of the said Act and the Cess Order were unconstitutional because of excessive delegation of the legislative power.

Held, allowing the application in part with no order as to costs:

(1) Parliament had authorised the Minister to impose cess on terms as set out in s 35 of the Act and the money collected for cess must be deposited into the Malaysian Palm Oil Board Fund to be managed by the board and used only for the purposes set out in s 33 of the Act. The Act was clear in terms and Parliament must have intended to allow the Minister to impose cess for the purposes set out in the Act (see para 8).

(2) Section 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statues. Looking at the underlying purposes for which the powers of collection of cess had been granted to the second defendant, the power to levy cess was constitutional (see paras 8 & 10).

(3) The funds collected by cess was paid into the fund pursuant to s 32 of the Act. Since Parliament had legislated to create the fund and provided the mechanism for its creation and for its use, the argument that all tax collected by way of cess should be placed in the consolidated fund was rejected (see para 10).

(4) The English version of the *Gazettes* clearly showed that consultation with the Minister of Finance took place. Further, s 81 of the Evidence Act 1950 provides that the court shall presume the genuineness of every document purporting to be the *Gazette* (see para 11).

(5) In the *Gazette* notification the second defendant had explained in para 6 the parties exempted and why. Since the second defendant had complied with s 77(1) of the Act, it was not for the court to challenge a valid decision of the second defendant. Further, art 8 of the Constitution is not absolute. The court adopted the principles set out in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where it was held that discriminatory law is good law if it is based on reasonable classification (see paras 12–14).

(6) The purpose for the collection of cess was to subsidise the price of cooking oil at that time. That was clearly not one of the purposes that funds from the fund managed by the Board pursuant to s 33 of the Act could be used. There was no provision that enabled the first defendant to expend funds outside the scope of s 33 of the Act. Therefore, the purpose for collection of cess under the impugned Cess Order was ultra vires the Act and was void and illegal (see para 15).

[Bahasa Malaysia summary

Perintah Lembaga Minyak Kelapa Sawit (Ses) (Buah Minyak Kelapa Sawit) 2007 ('Perintah Ses') telah dibuat oleh defendan kedua ('Menteri') di bawah kuasa s 35 Akta Lembaga Minyak Kelapa Sawit 1998 ('Akta') dan mula berkuat kuasa pada 1 Jun 2007. Perintah Ses memperuntukkan levi dan kutipan ses oleh, defendan pertama, Lembaga Minyak Kelapa Sawit Malaysia ('Lembaga'), daripada pengeluar-pengeluar buah minyak kelapa sawit untuk buah-buahan minyak kelapa sawit. Menurut Perintah Ses pengeluar-pengeluar buah minyak kelapa sawit yang memiliki: (a) pegangan minyak kelapa sawit tidak kurang daripada 40.46 hektar; atau (b) pegangan minyak kelapa sawit yang dalam jumlah agregat tidak kurang daripada 40.46 hektar, dikehendaki membayar Lembaga satu ses untuk setiap tan metrik buah minyak kelapa sawit yang dihasilkan pada kadar yang ditetapkan dalam jadual kepada Perintah Ses apabila harga purata bulanan minyak kelapa sawit mentah melebihi RM1,500 per tan metrik. Kategori-kategori individu tertentu bagaimanapun dengan jelas dikecualikan daripada membayar ses di bawah Perintah Ses. Plaintif membuat serangan terhadap Akta Lembaga Minyak Kelapa Sawit 1998 Malaysia dan Perintah Ses atas alasan bahawa ia telah melanggar beberapa peruntukan Perlembagaan Persekutuan ('Perlembagaan') dan oleh itu tidak berperlembagaan dan/atau ultra vires. Plaintif telah mendakwa, antara lain, bahawa: (i) Perintah Ses adalah ultra vires Perlembagaan kerana ia tidak memperuntukkan untuk bayaran ses sebagai cukai persekutuan ke dalam dana yang disatukan di bawah perkara 97(1) Perlembagaan; (ii) Perintah Ses adalah ultra vires Perlembagaan kerana tujuan pengisytiharannya untuk memberi subsidi bagi mengekalkan harga rendah minyak masak tidak diberi kuasa oleh undang-undang persekutuan di bawah perkara 104(3) Perlembagaan atau mana-mana undang-undang lain dan dengan itu bukan tujuan sah yang mana cukai boleh dikenakan; (iii) Perintah Ses adalah cukai yang berdiskriminasi dan adalah ultra vires perkara 8 Perlembagaan; (iv) Perintah Ses 2007 adalah terbatal dan tidak sah kerana ia tidak menggambarkan apa-apa perundingan dengan Menteri Kewangan; dan (v) sama ada s 35 Akta tersebut dan Perintah Ses adalah tidak berperlembagaan kerana penugasan berlebihan kuasa perundangan.

Diputuskan, membenarkan sebahagian permohonan tanpa perintah untuk kos:

(1) Parlimen telah memberi kuasa kepada Menteri untuk mengenakan ses atas syarat-syarat yang ditetapkan dalam s 35 Akta dan wang yang dikumpul untuk ses hendaklah disimpan ke dalam Dana Lembaga Minyak Kelapa Sawit Malaysia untuk diuruskan oleh Lembaga dan hanya digunakan bagi tujuan yang telah ditetapkan dalam s 33 Akta. Akta tersebut adalah jelas tentang syarat-syarat dan Parlimen mestilah telah berniat untuk membenarkan Menteri mengenakan ses bagi tujuan yang ditetapkan dalam Akta itu (lihat perenggan 8).

(2) Seksyen 17A Akta Tafsiran 1948 dan 1967 mengarahkan pendekatan harfiah kepada pentafsiran statutori. Ini terpakai untuk semua statut termasuklah statut-statut yang mengenakan cukai. Berdasarkan tujuan yang menjadi dasar kuasa-kuasa kutipan ses yang telah diberikan kepada defendan kedua, kuasa untuk mengenakan ses adalah berperlembagaan (lihat perenggan 8 & 10).

(3) Wang yang dikutip oleh ses telah dibayar ke dalam dana menurut s 32 Akta. Oleh kerana Parlimen telah menggubal untuk mewujudkan dana tersebut dan memperuntukkan mekanisme untuk pewujudan dan penggunaannya, hujah bahawa semua cukai yang dikutip melalui ses hendaklah diletakkan ke dalam dana yang disatukan adalah ditolak (lihat perenggan 10).

(4) Versi bahasa Inggeris warta-warta tersebut jelas menunjukkan bahawa perundingan dengan Menteri Kewangan telah diadakan. Selanjutnya, s 81 Akta Keterangan 1950 memperuntukkan bahawa mahkamah hendaklah menganggap ketulenan setiap dokumen itu dikatakan sebagai warta (lihat perenggan 11).

(5) Dalam warta pemberitahuan defendan kedua telah menjelaskan di perenggan 6 tentang pengecualian pihak-pihak dan sebabnya. Oleh kerana defendan kedua telah mematuhi s 77(1) Akta, ia bukan untuk mahkamah mencabar keputusan sah defendan kedua. Selanjutnya, perkara 8 Perlembagaan bukan mutlak. Mahkamah menggunakan prinsip-prinsip yang ditetapkan dalam *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 di mana telah diputuskan bahawa undang-undang yang berdiskriminasi adalah undang-undang baik jika ia berdasarkan klasifikasi yang munasabah (lihat perenggan 12–14).

(6) Tujuan kutipan ses adalah untuk memberi subsidi kepada harga minyak masak pada masa itu. Ia jelas bukan salah satu daripada tujuan agar wang daripada dana yang diuruskan oleh Lembaga menurut s 33 Akta boleh digunakan. Tidak ada peruntukan yang membolehkan defendan pertama membelanjakan wang di luar skop s 33 Akta. Oleh itu, tujuan untuk kutipan ses di bawah Perintah Ses yang dipersoalkan adalah ultra vires Akta tersebut dan tidak sah dan menyalahi undang-undang (lihat perenggan 15).]

Notes

For a case on agriculture generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1821.

For cases on interpretation law generally, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1925–1937.

For cases on legislation generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2249–2253.

For cases on revenue law, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2051–2586.
For cases on strict construction, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2002–2004.
For cases on taxing statute generally, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1995–2004.
For cases on validity, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1989–1993.

Cases referred to

ABL International Ltd & Anor v Export Credit Guarantee Corporation of India Ltd & Ors (2004) 3 SCC 553 (refd)
AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal [2008] 4 MLJ 487, CA (refd)
Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155, FC (folld)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)

Legislation referred to

Evidence Act 1950 s 81
Federal Constitution arts 4(4), 8
Malaysian Palm Oil Board Act 1998 ss 32, 33, 34, 35, 36, 77(1)
Malaysian Rubber Board (Incorporation) Act 1996
Moneylender Act 1951
Palm Oil Research and Development Act 1979 (repealed by the Malaysian Palm Oil Board Act 1998)

T Sudhar (Jeremy Lee with him) (Shook Lin & Bok) for the plaintiffs.
Abu Bakar Jais (Hisham Sobri & Kadir) for the first defendant.
Nor Hisham bin Ismail (Aida Adhha bt Abu Bakar with him) (Senior Federal Counsel, Attorney General's Chambers) for the second and third defendants.

Prasad Abraham JC:

[1] Enclosure 1 was heard on 4 February 2010 and continued on 1 March 2010, and after hearing extensive and interesting arguments on the points of law canvassed by respective counsel, I reserved my decision to 31 March 2010 wherein I granted an order in terms of prayers (h) only of encl 1 and I append below my reasons for so doing.

[2] From a gleaning of the various prayers of encl 1, it can be observed, that the plaintiffs has mounted an attack on the Malaysian Palm Oil Board Act 1998 and the regulations made there under (the said Act) on the grounds it

violates several provisions of the Federal Constitution and is therefore unconstitutional and/or ultra vires and are praying for certain provisions of the said Act and Orders made there under to be struck down. To better understand the application of the plaintiffs, there is a need to go through briefly the background facts leading up to this application.

[3] The background facts which are basically found in paras 4–16 of encl 2 are as follows:

The Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007 (hereafter 'the Cess Order 2007') — was made by the 2nd Defendant (hereafter 'the Minister') under the authority of s. 35 of the Malaysian Palm Oil Board Act 1998 (the said 'Act') — and came into operation on 1.6.2007. This Order 2007 has been revoked from 1/8/2008.

(1) The Cess Order 2007 provided for the levy and collection of cess by, the 1st Defendant, the Malaysian Palm Oil Board (hereafter 'the Board'), from oil palm fruit producers on oil palm fruits — para 4 of the Cess Order 2007. By virtue of the Cess Order 2007 (para 2) oil palm fruit producers who owned (a) oil palm holding which is not less than 40.46 hectares or (b) oil palm holdings which in aggregate amount to not less than 40.46 hectares, were required to pay the Board a Cess for every metric ton of oil palm fruit produced at the rates specified in the schedule to the Cess Order 2007 (para 3), when the monthly average price of crude palm oil exceeds RM1,500 per metric ton.

(2) The following oil palm fruit producers were however expressly exempt from paying cess under the Cess Order 2007 i.e. any government land scheme with settlers or individuals participant, planted with oil palm or (b) any oil palm small holding owned by individuals but managed and controlled by government agencies. Hence, the Cess Order 2007 granted an exemption from payment and cess to government or government related schemes such as FELDA, FELCRA, RISDA, KESEDAR, LKPPP, SALCRA, LKTNS, Koperasi Sungai Manilan and Beliawanis.

(3) Further, the Cess Order 2007 did not apply to oil palm fruit producers who owned oil palm holding(s) which was/were less than 40.46 hectares. Neither did the Cess Order 2007 apply to millers, refiners, packers, end-producers, end product retailers, suppliers and/or wholesalers. The Cess Order 2007 did not also apply to end users.

(4) The reason for the making of the Cess Order 2007 and the imposition of a cess is set out in para 16 of Enc. 2.

[4] The issues raised by the plaintiffs:

(i) whether the Cess Order 2007 is ultra vires Article 96 and Article 67 of the Federal Constitution;

(ii) whether the Cess Order 2007 is ultra vires the Federal Constitution as it does not

provide for payment of the cess as a federal tax into the consolidated Fund under Article 97(1) of the Federal Constitution;

(iii) whether the Cess Order 2007 is ultra vires the Federal Constitution as its declared purpose of providing a subsidy for keeping down the price of cooking oil is not authorized by federal law under Article 104(3) or at all and is therefore not a lawful purpose for which a tax can be imposed;

(iv) whether the Cess Order 2007 is a discriminatory tax and is ultra vires Article 104(3) of the Federal Constitution;

(v) whether section 77 of the said Act is ultra vires the Federal Constitution as it confers upon the executive a legislative function;

(vi) whether section 35 of the said Act and the Cess Order 2007 made there under are unconstitutional because of excessive delegation of the legislative power;

(vii) whether section 35 of the said Act is unconstitutional as it confers taxing authority on the executive;

(viii) whether the Cess Order 2007 is invalid and ultra vires the said Act as its declared purpose of providing a subsidy for keeping down the price of cooking oil is not authorized or sanctioned by the said Act and is therefore not a lawful purpose for which the cess can be imposed;

(ix) whether the Cess Order 2007 is invalid and ultra vires the said Act as the Board is not empowered by the Act to collect cess;

(x) whether the Cess Order 2007 is invalid and ultra vires the said Act as there is no power to grant exemptions;

(xi) whether the Cess Order 2007 is invalid, null and void as it does not reflect any consultation with Minister of finance;

(xii) whether the Cess Order 2007 is ultra vires the said Act as it seeks to impose a cess on 'oil palm fruits';

(xiii) whether the Cess Order 2007 is ultra vires the Act as it seeks to impose tax by way of cess on oil palm fruit producers who are not otherwise subject to such liability under the said Act; and

(xiv) whether the Cess Order 2007 is void as subsidiary legislation that is partial and unequal, manifestly unjust, unreasonable and grossly disproportionate.

[5] The first defendant, the Malaysian Palm Oil Board submits the various sections of the said Act are valid and do not contravene the Federal Constitution. Counsel for the first defendant also raised the point that since the thrust of the plaintiffs' challenge seems to be constitutional, leave of the Federal Court (art 4(4)) of the Federal Constitution is necessary. The second defendant ie the Minister raises essentially the same arguments but emphasises that the court has a wide discretion in granting declarations. See pp 11–12 of their written submissions which sets out the law on the same and the cases cited therein.

[6] It is my judgment, to decide on the points raised by the plaintiffs, one has to look at the said Act and in particular s 35 which is reproduced:

35

(1) The Minister may, *after consultation with the Minister of Finance*, make orders for the imposition, variation or cancellation of a cess on oil palm products produced in or exported from Malaysia and the orders may specify the nature, amount and rate of the cess person or class of persons on whom the cess is imposed (I/ACT A 1222/04 W.W.F 2/7/2004) and the manner of collection of the cess.

(2) Expert in so far as may be otherwise provided in any order made under subsection (1), the cess imposed by such order shall, for the purposes of its collection and for the enforcement of the collection thereof, be deemed to be a customs duty under the Customs Act 1967.

(3) *An order made under this section may prescribe different amounts, rates and manner of collection for different types or grades of oil palm product in relation to different persons or different classes of persons* (I/ACT A1222/04 W.E.F. 2/7/2004).

[7] I also reproduce s 32 of the said Act:

32(1)There is established, for the purposes of this Act, a fund to be known as the 'Malaysian Palm Oil Board Fund', to be administered and controlled by the Board.

(g) Monies collected or paid under Section 35.

[8] It is clear that Parliament has authorised the Minister to impose cess on terms as set out in s 35 and the money collected for cess must be deposited into the Malaysian Palm Oil Board Fund to be (see s 32) managed by the board and used only for the purposes set out in s 33 of the said Act. I am of the view that the said act is clear in terms and Parliament must have intended to allow the Minister to impose cess for the purposes set out in the Act. The Federal Court has dealt with this issue in the case of *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97 an appeal — where the Federal Court was dealing with the precursor to the present Act ie the Palm Oil Research and Development Act 1979, wherein they held by a majority at p 98:

(1) (per Steve Shim CJ (Sabah and Sarawak), Haidar CJ (Malaya) concurring) Section 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statues.

[9] See also the judgment of Steve Shim CJ (Sabah and Sarawak) at p 108 of the report:

[12]With respect, the principle of strict interpretation of statutes enunciated

by Rowlatt J could not be regarded as the locus classicus on the issue. Indeed as long ago as 1899, Lord Russell of Killowen CJ took a different approach in *Attorney-General v Carlton Bank* [1899] 2 QB 158, when he said, inter alia:

> I see no reason why special cannons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of a court is, in my opinion, in all cases the same; whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the Legislature.

[13]In *Luke v Inland Revenue Commissioners* [1963] AC 557, Lord Reid in the House of Lords, echoed similar views. And much later, Lord Wilberforce expanded the principle in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 when he said as follows:

> A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act ... What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. They may, indeed should, be considered in the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded …

[14]This is known as the *Ramsay* principle. While clear words are needed before a tax can be imposed, what those words are would be interpreted in line with the purposive approach. Undoubtedly, in the United Kingdom, there is currently a more pronounced shift from the strict literal interpretation of a taxing statute. The *Ramsay* principle of statutory interpretation seems to have entrenched itself (see *Pepper (Inspector of Taxes) v Hart* [1993] AC 59). In Malaysia, that principle should apply and it must be applied in consonance with s 17A of the Interpretation Acts 1948 and 1967 which stipulates:

> *In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.*

[15]It is pertinent to note that s 17A was a recent amendment under the Interpretation (Amendment) Act 1997 (Act A996) and became effective on 25 July 1997. This would be after the *National Land Finance Co-operative*. In my view, the law is now clear beyond doubt. Section 17A above enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statues. That answers the second question posed.

[10] I therefore hold looking at the underlying purposes for which the

powers of collection of cess has been granted to the second defendant, the power to levy cess bearing in mind, the Federal Court has held that cess is a tax, is constitutional adopting the purposive approach as the courts are enjoined to do. The funds collected by cess is paid into the fund pursuant to s 32 and it is also pertinent to note that the Federal Government also contributes annually to the fund. Since Parliament has legislated to create this fund and provides the mechanism for its creation and for its use, I reject the argument that all tax collected by way of cess should be placed in the consolidated fund. I had occasion to look at the rubber industry and the Malaysian Rubber Board (Incorporation) Act 1996 which is similar in terms to the said Act. It is clear that Parliament must have intended that in the oil palm and rubber industry two pillars of the commodity sector, collection of cess has been allowed so that the proceeds of the cess could be used for the benefit of the industry.

[11] The plaintiffs' also raised the point that the second defendant had not consulted with the Minister of Finance as the second defendant is required to do under s 35 of the said Act. I reproduce the English version of the *Gazettes* which clearly shows that consultation took place:

> Malaysian Palm Oil Board (Cess) (Oil Palm Fruit) Order 2007. In exercise of the powers conferred by section 35 of the Malaysian Palm Oil Board Act 1998 [Act 582], the Minister after consultation with the Minister of Finance makes the following order (P.U. (A) 200 p 2264).

and see also s 81 of the Evidence Act 1950:

> The court shall presume the genuineness of every document purporting to be the *Gazette* or the London *Gazette*, or the *Government Gazette* of any part of the Commonwealth, or to be the *Gazette* issued by the local Government of any part of the Commonwealth, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by Her Britannic Majesty's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if the document is kept substantially in the form required by law and is produced from proper custody.

[12] The plaintiffs had in their submissions made the point that the cess order under s 35 of the said Act had the effect of being discriminatory and allowed the Minister to exempt individual or companies for the tax to be imposed. Section 77(1) of the said Act is now reproduced:

> The Minister may by order published in the *Gazette* exempt any person or class of persons or any palm products or other thing from all or any of the provisions of this Act.

[13] In the *Gazette* notification the second defendant has explained in para 6 the parties exempted and why. I am of the view that since the second defendant

has complied with the said section it is not for this court to challenge a valid decision of the second defendant. See the decision of the Court of Appeal in *AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd and another appeal* [2008] 4 MLJ 487 (Civil Appeal Nos W-02–665 of 2004 and W-02–619 of 2000, Court of Appeal (Putrajaya)), where the court was dealing with the power of the Minister of Housing and Local Government to exempt under the Moneylender Act at para 28 of the case:

> [28] To conclude on this point, the Minister empowered to grant the exemption under s 2A(2) of the Act is the Minister of Housing and Local Government. The exemption order PU(B) 242/1996 is valid and of full legal effect. By reason of the exemption order PU(B) 242/1996 issued, in respect of any loan given to AM-EL which is related to credit leasing/share financing, AEH was entitled to impose terms and conditions inconsistent with the provisions of the Act.

[14] Referring to the point of discriminatory legislation generally, I am in agreement with the submission of counsel for the first defendant, that art 8 of the Federal Constitution is not absolute and I adopt the principles set out in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155.

> (b) Discriminatory law is good law if it is based on reasonable classification, provided that such classification is:
>
> (i) rational;
>
> (ii) founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group;
>
> (iii) there must be a policy or object sought to be achieved by the law in question; and
>
> (iv) there must be a nexus between the basis of classification and the object of the law in question.

[15] It is clear from the booklet distributed by the board at its briefing in Sitiawan, Perak encl 2 and the affidavit of the Minister ie the second defendant (encl 20, para 28) the purpose for the collection of cess was to subsidise the price of cooking oil at that time. That in my view is clearly not one of the purposes that funds from the fund managed by the Board pursuant to s 33 of the said Act can be used. I had also looked at ss 34, 35 and 36 of the said Act and there appears no provision that enables the first defendant to expend funds outside the scope of s 33 of the said Act. I therefore hold that the purpose for collection of cess under the impugned Cess Order is ultra vires the said Act and is void and illegal. I refer to the Federal Court decision referred to and in particular the judgment of Gopal Sri Ram JCA in *Palm Oil Research and Development Board Malaysia & Anor* at p 118:

[39] Before considering the three alleged instances of ultra vires, it is apposite to restate the law governing unauthorised action by the executive as authoritative guidance for the courts in the hierarchy of our judicature. For this purpose, it is convenient to identify executive acts as being either purely administrative in nature on the one hand or as quasi-legislative. Quasi-legislative power is exercised by a member of the administration — usually one of His Majesty's Ministers — pursuant to a power conferred by Parliament to make subsidiary legislation.

[40] The starting point for the present discussion is the source in our jurisdiction of what Anglo-Saxon jurisprudence initially termed as 'administrative law' and which it now refers to by the more generic expression 'public law' and in which is housed the concept of ultra vires or illegality. I use the expression 'illegality' as an alternative to ultra vires by freely borrowing it from Lord Diplock's Delphic pronouncement in *Council of Civil Unions v Minister for the Civil Service* [1985] AC 374.

[51] There are two additional matters that call for emphasis. Firstly, in our jurisdiction — unlike England — any subsidiary legislation to be valid must be intra vires the parent statute and the Federal Constitution. In *MP Jain's Administrative Law of Malaysia and Singapore*, (3rd Ed), the learned author, whose views are entitled to great respect, has this to say:

> The parent statute may be constitutional, but the subsidiary legislation made there under may be unconstitutional. The court will strike down delegated legislation, as it strikes down any statute, if it comes in conflict, or does not conform, with a constitutional provision. Here again, reference has to be made to constitutional law to assess whether the regulation in question infringes a constitutional provision. The frame of reference to adjudge the validity of the regulation or subsidiary legislation is the Constitution.

[53] Secondly, when determining whether a particular piece of subsidiary legislation is intra or ultra vires its parent statute, the court is wholly unconcerned with its underlying principles or policy. The subsidiary legislation may have the most laudable social policy at its heart: yet if it is beyond the terms of the delegation extended by Parliament it is invalid.

[54] In *McEldowney v Forde* [1971] AC 632, Lord Diplock while explaining the role of the courts in the context of the unwritten constitution of the United Kingdom had this to say:

> The division of functions between Parliament and the courts as respects legislation is clear. Parliament makes laws and can delegate part of its power to do so to some subordinate authority. The courts construe laws whether made by Parliament directly or by a subordinate authority acting under delegated Legislative powers. *The view of the courts whether particular statutory of subordinate legislation promotes or binders the common weal is irrelevant*. The decision of the courts as to what the words used in the statutory or subordinate legislation mean is decisive. Where the validity of subordinate legislation made pursuant to powers delegated by Act of Parliament to a subordinate authority is challenged, the court has a three-fold task: first to determine the

meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorised to make, secondly to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description. (Emphasis added.)

[55] Despite these views appearing in Lord Diplock's dissenting speech in the House, it has acquired much repute and has been quoted by Peh Swee Chin FCJ in this court in *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437. In *Wong Pot Heng & Anor v Kerajaan Malaysia* [1992] 2 MLJ 885, Eusoff Chin J at first instance quoted foregoing passage in Lord Diplock's dissent in *McEldowney v Forde* [1971] AC 632 and said:

There is also no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if in making it, the person/body to whom power is delegated to make the rules or regulations, acted outside the Legislative powers conferred on him/it by the Act of Parliament under which the rules or regulations were purported to have been made.

[56] That a court is entirely unconcerned with the underlying principles or policy or popularity of a piece of subsidiary legislation is a proposition that applies equally in a jurisdiction with a written constitution. Thus in *Maharashtra State Board of Secondary and Higher Secondary Edu v Paritosh Bhupesh Kumar Sheth etc* AIR 1984 SC 1543, Balakrishna Eradi J when delivering the judgment of the Indian Supreme Court said:

The court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation making body. It may be wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rate or regulation will not render it ultra vires and the court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and a delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation making power or its being inconsistent with any of the provisions of the parent Enactment or in violation of any of the limitations imposed by the Constitution.

[57] A little later, in the same judgment, the learned judge added:

In the light of what we have stated above the constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely, (a) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate; (b) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provision of the

parent Enactment; and lastly (c) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution.

[58] In my considered judgment, it is the three-fold test formulated by Balakrishna Eradi J in the above quoted passage that should be applied by our courts when determining the validity of a piece of subsidiary legislation. It must never be forgotten by our courts when adjudicating upon a public law case that all state action must in appropriate cases be in accordance with the terms of any relevant written law but must in all cases be in accordance with the provisions of the Federal Constitution, in particular the fundamental liberties guaranteed by Part II thereof.

[59] It is with these principles in mind that I now turn to consider the question whether the 1979 Order is tainted by substantive ultra vires. To recapitulate, the first submission is that the 1979 Act does not authorise the collection of cess from palm oil millers. To determine if there is merit in this complaint, all that is necessary is to examine the Act itself. There is no dispute — indeed there cannot be any — that the 1979 Act does not define the term 'palm oil miller'. Section 14(1) by which Parliament delegates subsidiary law making authority to the Minister reads as follows:

> 14(1) The Minister may, after consultation with the Board and with the Minister of Finance, make orders for the imposition, variation or cancellation of a research cess on palm oil; and the orders may specify the nature, the amount and rate and the manner of collection of the cess.

[60] Be it noted that the section empowers the Minister, inter alia, to impose research cess on palm oil: not on palm oil millers. The point of construction here is therefore uncomplicated and straightforward. The 1979 Act did not give the Minister power to make orders imposing a research cess on palm oil millers. And it is not open to this court to read into the section an implied power enabling the Minister to do so. Such a course would constitute unauthorised judicial legislation and a breach of the doctrine of separation of powers enshrined in the Federal Constitution.

[61] In Malaysia, the Federal Constitution has entrusted the law making power to Parliament and the state assembly of each of the several states of the federation. While the courts through the common law recognise the power of Parliament to delegate some of its Legislative power, it is equally the constitutional duty of the courts to ensure that no excessive delegation takes place. Hence the well settled principle that a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly. This is particularly so where the subsidiary legislation is one that imposes a financial levy — call it a tax or charge or cess or whatever you may — upon the whole or any section of the public. It is difficult to find a clearer authority on the point than the decision of the English Court of Appeal in *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884, which affirmed by the House of Lords. See (1922) 38 TLR 781.

[16] In the light of the aforesaid, I find the collection of the cess to subsidise

the cooking oil price at the material time is ultra vires the said Act. I therefore granted an order in terms of prayer (h) encl (1).

[17] Having so decided, I now had to consider whether I should grant prayer (n) of encl 1. The plaintiffs submit in the light of my earlier prayer (n) should follow as of course. The defendants in their submission refer to the case of *ABL International Ltd & Anor v Export Credit Guarantee Corporation of India Ltd & Ors* (2004) 3 SCC 553 wherein the following views were expressed.

> However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should not necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.

[18] I invited counsel to either submit why the court should make an order for refund of cess or the plaintiffs should file a separate action for refund of the cess collected, in view of my ruling.

[19] On the upshot I granted order in terms of prayer (h) of encl 1 with no order as to costs.

Application allowed in part with no order as to costs.

Reported by Kanesh Sundrum